

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL
DEVELOPMENT PERMIT ISSUED BY
THE CITY OF POULSBO TO EMMANUEL
J. XENOS

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY, AND SLADE GORTON,
ATTORNEY GENERAL,

Appellants,

v.

THE CITY OF POULSBO AND EMMANUEL
J. XENOS,

Respondents.

SHB No. 201

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter was brought before the Shorelines Hearings Board
Chris Smith, Chairman, Robert F. Hintz, Gerald D. Probst, and Walt
Woodward (presiding) on January 15 and 16, 1976 in Poulsbo, Washington.
Appellants, Department of Ecology and Slade Gorton, Attorney General,
were represented by Robert V. Jensen, Assistant Attorney General;
respondent, Emmanuel J. Xenos, was represented by his attorneys, C.

1 Conrad Green and R. E. Krucker; respondent City of Poulsbo appeared by
2 and through its attorney, Robert Baronsky. Olympia court reporters
3 Jennifer Roland and Sherri Darkow recorded the proceeding.

4 Having heard the testimony, having examined the exhibits, and
5 having heard the arguments of counsel, and the Board having received
6 exceptions to its proposed Findings, Conclusions and Order from
7 appellants, and having considered exceptions from appellants, said
8 exceptions being granted in part and denied in part, the Shorelines
9 Hearings Board makes the following

10 FINDINGS OF FACT

11 I

12 A substantial development permit for the construction of a 40 foot
13 by 60 foot "delicatessen" addition over the water to an existing
14 restaurant constructed partly over the water was issued to Emmanuel J.
15 Xenos by the City of Poulsbo on August 1, 1975. Appellants received
16 notice of this action on August 8, 1975. Appellants thereafter filed
17 their request for review with this Board on September 22, 1975.

18 II

19 Respondent Xenos owns the tidelands upon which all proposed
20 construction will be built. The subject property is located in the
21 City of Poulsbo and on the shores of Liberty Bay. Liberty Bay Park
22 complex lies to the north of the proposed development and, since 1972,
23 has been and is being constructed on the shorelines. The proposed
24 development would lie above and landward from the line of extreme low
25 tide, and seaward of the mean higher high water mark.

26 III

27 Respondent Xenos made application for a substantial development

1 permit on March 28, 1975. On July 1, 1975, the City of Poulsbo's
2 Planning Commission unanimously recommended denial of the application
3 apparently for the reason that the proposed development was not water-
4 dependent pursuant to RCW 90.58.020, WAC 173-16-040(4)(b)(iv),
5 WAC 173-16-060(4), and Use Activity Regulations, including those for
6 "Commercial Development," in the City of Poulsbo draft Shoreline
7 Management Master Program (Appellants' Exhibit A-1(a), page three).
8 The cumulative and ultimate effect, concluded the Planning Commission,
9 would be to force "legitimate water-dependent facilities to expand
10 elsewhere--eventually to undeveloped tidelands." Id.

11 IV

12 At the regular City Council meeting on July 23, 1975, the Council
13 considered the application and the Planning Commission's recommendation.
14 The Council found inter alia, that the immediate harbor area containing
15 the proposed development was substantially blocked in four directions;
16 that man has already altered the "natural conditions" of the shorelines;
17 that the proposed development would provide an opportunity for services
18 that the respondent Xenos would offer to permanent and transient moorage
19 users; and that the City of Poulsbo's draft Master Shoreline Program
20 should not control since it was neither adopted by the City nor approved
21 by the Department of Ecology. Appellants' Exhibit A-1(b). The Council
22 then concluded, inter alia, that commercial developments should be
23 located where other such developments exist [WAC 173-16-060(4)(v);
24 WAC 173-16-040(b)(iv)] and that the project was "water-dependent." Id.
25 The Council approved the application and thereafter approved the permit
26 which is the subject matter of this request for review.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

V

On the day of issuance of the appealed permit (August 1, 1975) the City of Poulsbo had prepared a draft Shoreline Master Program. (Appellants' Exhibit A-3). Such draft master program had neither been adopted by the City Council nor approved by the Department of Ecology. The master program was then into its second draft. We find such draft to be ascertainable. (Later in August, the City Council adopted a master program in substantially the same form as the second draft master program. The master program has since been approved by the Department of Ecology.)

VI

The draft master program provides that:

F. Commercial Development:

1. Any commercial development, structure, facility or use except one which requires or is dependent on direct contiguous access to the water, shall be set back from the ordinary high water mark by ten (10) feet. Only parking incidental to the commercial use activity shall be permitted on the shoreline.

.

(Use Activity Regulations, page 2, draft master program.)

C. Urban Environment:

1. Definition:

This environment is defined as an area subject to intensive modification of natural features caused by human activity.

2. Purpose:

The purpose of placing an area in an Urban environment is to ensure proper utilization of the area by a multiplicity of intense urban uses, and to encourage the existence of desirable and pleasant

1 urban shorelines. All use activities should be
2 permitted in this environment subject to pertinent
3 regulations and policies.

4

5 (Environments, page 8, Goals and Policies, draft
6 master program.)

7 The proposed development lies in an "Urban" environment. See
8 Appellants' Exhibit A-3(d).

9 VII

10 Respondent Xenos has owned and operated the existing restaurant
11 known as the Viking House for approximately 12 years. In 1968, he
12 expended substantial funds in remodeling the exterior and second floor
13 of the existing structure. Subsequently, respondent Xenos has determined
14 that it is economically desirable to construct as an addition to the
15 existing structure, a delicatessen directed primarily at the market
16 comprised of boaters.

17 VIII

18 Respondent Xenos proposes this development to fill the expected
19 greatly increased demand for land-based support services for boaters
20 in a tourist-oriented town as a result of the increased moorages
21 presently available, and those contemplated in the future, in Liberty
22 Bay. The type of service proposed, a delicatessen, could also be
23 located on the uplands.

24 IX

25 Historically, boats from the greater Seattle area have been
26 attracted to Poulsbo as the destination of a weekend boat trip.
27 Recently, the number of visiting boaters has increased tremendously.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 However, the land support facilities have not kept pace. Respondent
2 Xenos' proposed delicatessen could provide services extending into
3 late evening, seven days a week.

4 X

5 A "delicatessen," in the nature of a restaurant, would permit a
6 substantial number of people to enjoy the shorelines. We are unable
7 to find that the proposed use is water-dependent, however.

8 XI

9 The waters at the site are navigable at upper stages of the tide.
10 However, the proposed development would decrease or impair the public's
11 right of navigation insignificantly because the site is substantially
12 surrounded in four directions. We find that the benefits of the
13 proposed delicatessen outweigh the small impairment of navigational
14 rights.

15 XII

16 At the proposed construction site, it is evident that people have
17 already degraded the otherwise natural shoreline with fill, buildings,
18 floats, piling, and floating marine storage.

19 XIII

20 Any Conclusion of Law which should be deemed a Finding of Fact
21 is hereby adopted as such.

22 From these Findings the Shorelines Hearings Board comes to these

23 CONCLUSIONS OF LAW

24 I

25 This Board has jurisdiction over the persons and over the subject
26 matter of this proceeding.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 II

2 RCW 90.58.140(2)(a) provides that when a master program is not yet
3 effective, a substantial development permit shall be granted: "[O]nly
4 when the development proposed is consistent with: (i) The policy of
5 RCW 90.58.020; and (ii) . . . the guidelines and regulations of the
6 Department [of Ecology]; and (iii) so far as can be ascertained, the
7 master program being developed for the area."

8 III

9 The subject shoreline has not been shown to be a "shoreline of
10 state-wide significance" pursuant to RCW 90.58.030(2)(e)(iii).¹
11 The preponderance of the evidence shows that the entire project lies
12 landward of the extreme low tide.

13 IV

14 The proposed delicatessen reduces in a minor degree the rights of
15 the public in navigable waters but provides a corresponding enhancement
16 of the public interest.

17 V

18 The proposed project does not constitute a use which is unique to
19 or dependent upon the shoreline. But neither does the project lie upon
20 a natural, i.e., unintruded, shoreline as contemplated by RCW 90.58.020.

21 VI

22 Appellants failed to prove that the project was not designed in
23

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- 24 1. "'Shorelines of state-wide significance' means the following
25 shorelines of the state: . . . those areas of Puget Sound
26 and the Strait of Juan de Fuca and adjacent salt waters
north to the Canadian line and lying seaward from the line
of extreme low tide" RCW 90.58.030(2)(e)(iii).

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 a manner to minimize, insofar as practical, any resultant damage to
2 the ecology and environment and any interference in the public's use
3 of the water.

4 VII

5 The proposed delicatessen does not thwart the policy of RCW 90.58.020.

6 VIII

7 WAC 173-16-060(4) provides in part that:

- 8 (a) Although many commercial developments benefit by a shore-
9 line location, priority should be given to those
10 commercial developments which are particularly dependent
11 on their location and/or use of the shorelines of the
12 state and other development that will provide an
13 opportunity for substantial numbers of the people to
14 enjoy the shorelines of the state.
15 (b) New commercial developments on shorelines should be
16 encouraged to locate in those areas where current
17 commercial uses exist.
18 (c) An assessment should be made of the effect a
19 commercial structure will have on a scenic view
20 significant to a given area or enjoyed by a signifi-
21 cant number of people.

22

23 We conclude that the proposed delicatessen provides an opportunity
24 for substantial numbers of people to enjoy the shorelines of the state.
25 It is located in a presently intensively developed area and would
26 impair no scenic view. As such, the project is consistent with the
27 above-quoted guidelines.

28 IX

29 Although WAC 173-16-040(b)(iv) states that "emphasis should be
30 given to development within already developed areas and particularly to
31 water-dependent industrial and commercial uses requiring frontage on
32 navigable waters," we conclude that the proposed delicatessen, which
33 affords an opportunity for a substantial number of people to enjoy the

34 FINAL FINDINGS OF FACT,
35 CONCLUSIONS OF LAW AND ORDER

1 shorelines of the state, is not inconsistent therewith. The delicatessen
2 will be built in an area that is already intensively developed.

3 X

4 The proposed delicatessen is not inconsistent with the
5 guidelines.

6 XI

7 The provision in the draft master program under "Commercial
8 Development" (see Finding of Fact VI) clearly imposes a ten (10) foot
9 setback from the ordinary high water mark. The proposed development
10 is inconsistent therewith. The City Council felt that it could not
11 "lean for guidance" on the draft master program because the master program
12 was neither adopted by the City nor approved by the Department of
13 Ecology. Appellants' Exhibit A-1(b), page two. Yet, the evidence
14 clearly shows that the material provisions of the draft master program
15 are ascertainable. We conclude that insufficient consideration was given
16 to the draft master program by the Council, and as such, the permit
17 must be vacated, and the matter remanded to the City of Poulsbo.

18 In developing its master program and in permit application review
19 (prior to adoption of a master program), local government has the
20 authority to vary the interpretation and application of the guidelines
21 in order to meet local conditions. WAC 173-16-060, 040. Once a master
22 program is adopted and approved, however, there is no flexibility to
23 vary the guidelines because the guidelines no longer apply.
24 RCW 90.58.140(2)(b); RCW 90.58.030(3)(a). Such a master program is
25 expected to provide the appropriate deviations from the guidelines that th
26 local jurisdiction deems necessary. The draft master program provides tha

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 all non-water dependent uses "shall be set back from the ordinary high
2 water mark by ten (10) feet." Use Activity Regulations, p. 2, Draft
3 Master Program. We believe the City has the power to do so and, having
4 expressed that policy, should follow it.

5 Master programs must provide for varying of the application of use
6 regulations of the program, including provisions for permits for
7 conditional uses and variances, "to insure that strict implementation
8 of a program will not create unnecessary hardships or thwart the policy
9 enumerated in RCW 90.58.020." RCW 90.58.100(5). Notwithstanding the
10 word "or" quoted above, we construe it to mean "and." Therefore, in
11 order to procure a conditional use permit or variance, it is necessary
12 to prove a hardship and to show that the policy of RCW 90.58.020 will
13 not be thwarted. Upon a proper showing the City could allow, with
14 appellants' approval, the proposed development to be constructed under
15 the appropriate variance or conditional use provision of its master
16 program.

17 Except as otherwise noted above, the proposed development has not
18 been shown to be inconsistent with Use Activity Regulations, paragraph
19 II, page one, Draft Master Program.

20 XII

21 Any Finding of Fact which should be deemed a Conclusion of Law is
22 hereby adopted as such.

23 From these Conclusions, the Shorelines Hearings Board enters this
24
25
26

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

ORDER

The action by the City of Poulsbo issuing a substantial development permit to Emmanuel J. Xenos is reversed and the matter is remanded to the City of Poulsbo to reconsider the application in light of the concerns addressed in Conclusion of Law XI above.

DATED this 14th day of April, 1976.

SHORELINES HEARINGS BOARD


CHRIS SMITH, Chairman


ROBERT F. HINTZ, Member


GERALD D. PROBST, Member


WALT WOODWARD, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

CERTIFICATION OF MAILING

I, Dolores Osland, certify that I deposited in the United States mail, copies of the foregoing document on the 14th day of April, 1976, to each of the following-named parties, at the last known post office addresses, with the proper postage affixed to the respective envelopes:

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